TEKUN NASIONAL v. PLENITUDE DRIVE (M) SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
YAACOB MD SAM JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-2243-12-2016,
W-02(NCVC)(W)-2244-12-2016 &
W-02(NCVC)(W)-2290-12-2016]
24 APRIL 2018

CONTRACT: *Breach – Agreement – Claim for payment – Agency appointed supplier to develop loan repayment facility by way of mobile gadget and standing instruction system – Gadgets delivered but agency failed to make payment and refused to proceed with project without providing reasons – Whether there was breach of terms – Whether there was repudiation of agreement – Whether agreement void for illegality – Whether liability established against agency – Whether supplier entitled to sums claimed for project – Damages – Whether to be assessed*

The defendant, an agency that approves and disburses loans and collects repayment of these loans, appointed the plaintiff to develop the entire core system infrastructure of the defendant, which consisted of upgrading the loan repayment facility by introducing the mobile gadget and standing instruction system. Thereafter, by an agreement ('the agreement'), the defendant awarded the plaintiff the contract to develop and implement the system. Subsequently, the plaintiff filed two suits against the defendant (i) Suit 382, a claim for RM29,829,132.40 and other reliefs including a claim for general damages for breach of contract and aggravated damages; and (ii) Suit 618, a claim for RM612,000 for successfully installing and commissioning the standing instruction system. Both suits were consolidated. It was the plaintiff's case that it had delivered 28 mobile gadgets to the defendant and since then the mobile gadget system was successfully in use. The defendant, however, refused and failed to give any instructions or consent to the plaintiff to deliver the remaining 472 mobile gadgets. The defendant then directed all its officers to stop using the mobile gadgets and failed to make payment and refused to continue with the mobile gadget project without providing any reasons. The plaintiff contended that the defendant breached the terms and repudiated the agreement. The plaintiff then proceeded to terminate the agreement and claimed damages for the breaches and for wrongful repudiation of the agreement by the defendant. In respect of the standing instruction system, the plaintiff contended that the quotation of RM612,000 to complete the project was accepted and agreed to by the defendant. The system was tested and after being accepted and approved by the defendant, the project went 'live' on 24 December 2014. However, the defendant still failed to make payment for the quoted amount. The defendant, however, submitted that it had been directed by the Ministry to terminate the

agreement, *inter alia*, due to breach of procedures in the procurement process and that the case was also being investigated by the Malaysian Anti-Corruption Commission where it was alleged that the MD/CEO of the defendant had no authority to enter into the agreement and that any transaction in excess of RM500,000 must obtain the approval of the board of trustees. As for the standing instruction system, the defendant contended that it was not liable to pay as there was no agreement for the said amount and as the standing instruction system was part of the zero investment scheme. The High Court Judge found that (i) there was strong credible evidence of acquiescence by the defendant that there was a valid contract for the mobile gadget project; (ii) the plaintiff was not entitled to claim the specific contract sum in light of s. 75 of the Contracts Act 1950 ('Contracts Act') but was entitled to general damages which was to be assessed; and (iii) as for the standing instruction system, the defendant was estopped from reneging on their obligation to pay under the invoice and judgment was therefore entered against the defendant for the sum of RM612,000. Aggrieved, both the plaintiff and the defendant appealed against the said decisions to this court. The issues that arose were (i) whether the agreement was void for illegality; (ii) whether liability had been established against the defendant; and (iii) whether the plaintiff was entitled to the sums claimed for mobile gadget project and the standing instruction system.

Held (dismissing defendant's appeal and plaintiff's appeal; matter remitted to High Court for assessment of damages for plaintiff)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Although the plaintiff had no licence to carry on the authorised business of payment system, the agreement was not illegal. Under the agreement, the plaintiff had undertaken to build and to develop the mobile gadget and standing instruction system for the defendant for purposes of collection of loan repayment from the defendant's customers. Collecting repayment from its customers had been the business of the defendants for a long time and it had the requisite approval from Bank Negara to do so. As such, the defendant was carrying on approved or licensed businesses. The present contract merely served to facilitate the collection of the repayment of loans using information technology to replace manual collection and was not an illegal business. The agreement was therefore valid. (paras 63 & 70)

(2) The conduct of the defendant in unilaterally suspending the mobile gadget project allegedly because they wanted to conduct a review as to its feasibility and/or to obtain the board of trustees' approval was nothing but a façade or cloak to re-negotiate the monetary terms of the agreement. The actions of the defendant cumulatively tantamount to conduct which was repudiatory of the agreement and the conduct of the defendant before the issuance of the plaintiff's notice of termination was

akin to an 'absolute refusal by the defendant to perform their part of the agreement.' The unilateral act of suspending the mobile gadget project amounted to a breach of the agreement. The termination by the defendant pursuant to the direction given by the Government was ineffective as prior thereto, the agreement had already been terminated by the plaintiff. (paras 72-74)

(3) There was no evidence that the plaintiff knew of any irregularity in the internal management of the defendant. The plaintiff had no knowledge of the defendant's purported policy that any transaction above the value of RM500,000 required the approval of the board of trustees. In fact, the defendant had taken the position that whether or not the defendant needed to take the agreement to the board of trustees was an internal matter or procedure and that the plaintiff had no knowledge of the internal procedure of the defendant. The judge was correct when he found no credible evidence that there was in existence such an internal process or procedure which required contracts with a monetary value in excess of RM500,000 to be approved by the defendant's board of trustees. (paras 25 & 80)

(4) Although the defendant may have initially expected the standing instruction system to be part of the zero investment concept, based on the conduct of the defendant, that expectation had been demolished. Not only did the defendant fail to object to the quotation for RM612,000, the invoice that followed was duly acknowledged by the defendant. Clearly, the reasonable inference to be drawn from the established facts would be that the defendant had agreed to the quotation of RM612,000. Thus, the judge's decision on quantum of RM612,000 for the standing instruction system was upheld. (paras 86-88)

(5) The judge's finding on liability of both mobile gadget project and the standing instruction system was affirmed. However, this court disagreed with the judge that the claim of RM29,829,132.40 was an item of special damages. It was general damages quantified as per cl. 11.2 upon breach. Clause 11.2 appeared to be a penalty under s. 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of a breach, it is to be treated as a penalty and therefore void under s. 75 of the Contracts Act. As cl. 11.2 contravened s. 75 of the Contracts Act, this court was bound to strike it down. The judge was correct to disallow the plaintiff's claim for the said amount. Herein, the plaintiff was clearly entitled to be compensated for any loss or damage including its loss of earnings and profits, if any, although it could not rely solely on cl. 11.2 to do so. Thus, the matter was to be remitted to the High Court for assessment of damages in order to ensure that the plaintiff was fairly and reasonably compensated for the defendant's conduct and breach. (paras 84, 92, 96 & 97)

Bahasa Malaysia *Headnotes*

Defendan, sebuah agensi yang meluluskan dan mengagihkan pinjaman dan mengutip bayaran balik pinjaman-pinjaman, melantik plaintif untuk memajukan keseluruhan sistem insfrastruktur defendan dengan menaik taraf kemudahan bayaran balik pinjaman dengan memperkenalkan alat mudah alih dan sistem arahan tetap. Seterusnya, melalui satu perjanjian ('perjanjian'), defendan mengawardkan plaintif satu kontrak untuk membangunkan dan melaksanakan sistem. Kemudiannya, plaintif memfailkan dua guaman terhadap defendan (i) Guaman 382, satu tuntutan untuk RM29,829,132.40 dan relif-relif lain termasuk tuntutan ganti rugi am untuk pelanggaran kontrak dan ganti rugi teruk dan (ii) Guaman 618, satu tuntutan untuk RM612,000 kerana plaintif telah berjaya memasang dan mentauliahkan sistem arahan tetap. Kedua-dua guaman disatukan. Kes plaintif adalah ia telah menyerahkan 28 alat mudah alih kepada defendan dan sistem alat mudah alih telah digunakan tanpa apa-apa masalah. Defendan, walau bagaimanapun, enggan dan gagal memberikan apa-apa arahan atau kebenaran kepada plaintif untuk menyerahkan baki 472 alat mudah alih yang tinggal. Defendan kemudiannya mengarahkan semua pegawai berhenti menggunakan alat mudah alih dan gagal membuat bayaran serta enggan meneruskan dengan projek alat mudah alih tanpa memberikan apa-apa alasan. Plaintif berhujah bahawa defendan telah melanggar terma-terma dan mengingkari perjanjian. Plaintif kemudiannya membatalkan perjanjian dan menuntut ganti rugi untuk pelanggaran dan pengingkaran secara salah perjanjian oleh defendan. Berhubungan dengan sistem arahan tetap, plaintif menghujahkan bahawa sebut harga RM612,000 untuk menyiapkan projek diterima dan disetujui defendan. Sistem telah diuji dan selepas diterima dan diluluskan oleh defendan, projek dilaksanakan secara 'siaran langsung' pada 24 Disember 2014. Walau bagaimanapun, defendan gagal membuat bayaran untuk jumlah yang disebut harga. Defendan pula menghujahkan bahawa ia telah diarahkan oleh Kementerian untuk membatalkan perjanjian kerana, antara lain, terdapat pelanggaran prosedur dalam proses perolehan dan bahawa kes ini disiasat oleh Suruhanjaya Pencegahan Rasuah Malaysia di mana ia didakwa bahawa MD/CEO defendan tidak mempunyai kuasa untuk memasuki perjanjian dan bahawa apa-apa transaksi yang melebihi RM500,000 harus diperoleh dengan kelulusan lembaga pemegang amanah. Untuk sistem arahan tetap pula, defendan menghujahkan tidak bertanggungjawab membuat bayaran kerana tiada perjanjian dibuat untuk jumlah tersebut dan kerana sistem arahan tetap adalah sebahagian skema pelaburan sifar. Hakim Mahkamah Tinggi mendapati (i) terdapat keterangan kredibel kuat pengakuran dari pihak defendan bahawa kontrak projek alat mudah alih adalah sah; (ii) plaintif tidak berhak ke atas tuntutan spesifik jumlah kontrak mengambil kira s. 75 Akta Kontrak 1950 tetapi berhak untuk mendapatkan ganti rugi am yang perlu ditaksir; dan (iii) untuk sistem arahan tetap,

defendan diestop daripada memungkiri kewajipan mereka untuk membayar invois dan penghakiman dimasukkan terhadap defendan untuk jumlah RM612,000. Terkilan, kedua-dua plaintif dan defendan merayu terhadap keputusan-keputusan tersebut ke mahkamah ini. Isu-isu yang timbul adalah (i) sama ada perjanjian adalah tidak sah atas kepenyalahan undang-undang; (ii) sama ada liabiliti dibuktikan terhadap defendan; dan (iii) sama ada plaintif berhak ke atas jumlah-jumlah yang dituntut untuk projek alat mudah alih dan sistem arahan tetap.

Diputuskan (menolak rayuan defendan dan rayuan plaintif; perkara diremitkan ke Mahkamah Tinggi untuk taksiran ganti rugi bagi plaintif) Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Walaupun plaintif tidak mempunyai lesen untuk menjalankan perniagaan rasmi sistem pembayaran, perjanjian tidak menyalahi undang-undang. Di bawah perjanjian, plaintif telah mereka dan memajukan alat mudah alih dan sistem arahan tetap untuk defendan bagi tujuan pengutipan pembayaran balik pinjaman daripada pelanggan-pelanggan defendan. Mengutip pembayaran balik daripada pelanggan-pelanggan sudah lama menjadi perniagaan defendan dan defendan mempunyai kelulusan daripada Bank Negara untuk berbuat demikian. Oleh itu, defendan melaksanakan perniagaan yang diluluskan atau dilesenkan. Kontrak ini hanya memudahkan pengutipan pembayaran balik pinjaman menggunakan teknologi maklumat untuk menggantikan pengutipan secara manual dan bukanlah perniagaan yang menyalahi undang-undang. Perjanjian dengan itu adalah sah.

(2) Kelakuan defendan yang secara unilateral menggantungkan projek alat mudah alih kerana ingin menjalankan semakan berkenaan kebolehlaksanaan dan/atau memperoleh kelulusan lembaga pemegang amanah hanyalah fasad atau satu penyelubungan untuk merunding semula terma-terma kewangan perjanjian. Kelakuan defendan berjumlah kepada tingkah laku yang memungkiri perjanjian dan tindakan defendan sebelum pengeluaran notis pembatalan defendan adalah serupa dengan 'keengganan sepenuhnya defendan untuk melaksanakan bahagian perjanjiannya.' Tindakan unilateral menggantungkan projek alat mudah alih berjumlah kepada satu pelanggaran perjanjian. Pembatalan defendan menurut arahan yang diberikan oleh Kerajaan tidak berkesan kerana sebelum itu, perjanjian telah pun dibatalkan oleh plaintif.

(3) Tiada keterangan bahawa plaintif mengetahui apa-apa ketakteraturan dalam pengurusan dalaman defendan. Plaintif tidak mempunyai pengetahuan berkenaan polisi defendan bahawa apa-apa transaksi atas nilai RM500,000 memerlukan kelulusan lembaga pemegang amanah. Defendan telah mengambil pendirian bahawa sama ada defendan perlu membawa perjanjian kepada lembaga pemegang amanah adalah satu

perkara atau prosedur dalaman dan plaintif tidak mempunyai apa-apa pengetahuan berkenaan prosedur dalaman plaintif. Hakim betul apabila mendapati tiada keterangan kredibel bahawa wujudnya proses atau prosedur dalaman yang memerlukan kontrak yang nilainya melebihi RM500,000 diluluskan oleh lembaga pemegang amanah defendan.

(4) Walaupun defendan mungkin pada mulanya menjangkakan sistem arahan tetap menjadi sebahagian konsep pelaburan sifar, berdasarkan tingkah laku defendan, jangkaan itu telah dihapuskan. Defendan bukan sahaja gagal membantah sebut harga RM612,000, invois yang mengikuti juga diakui defendan. Jelas sekali, inferens munasabah yang dicapai daripada fakta-fakta yang dibuktikan adalah defendan telah bersetuju dengan sebut harga RM612,000. Oleh itu, keputusan hakim berkenaan kuantum RM612,000 untuk sistem arahan tetap dipertahankan.

(5) Dapatan hakim berkenaan liabiliti kedua-dua projek alat mudah alih dan sistem arahan tetap disahkan. Walau bagaimanapun, mahkamah ini tidak bersetuju dengan hakim bahawa tuntutan RM29,829,132.40 adalah item ganti rugi khas. Ia adalah ganti rugi am yang dinyatakan kuantiti menurut kl. 11.2 atas pelanggaran. Klausa 11.2 adalah penalti bawah s. 75 Akta Kontrak kerana ia menetapkan dan menentukan jumlah sebagai perlu bayar atas pelanggaran. Undang-undang matan adalah jika jumlah yang disebut dalam satu kontrak dinyatakan sebagai jumlah yang perlu dibayar apabila pelanggaran berlaku, ia harus dianggap sebagai penalti dan dengan itu terbatal bawah s. 75 Akta Kontrak. Oleh kerana kl. 11.2 melanggar s. 75 Akta Kontrak, mahkamah ini terikat untuk membatalnya. Berikutan itu, hakim betul apabila tidak membenarkan tuntutan plaintif untuk jumlah tersebut. Di sini, plaintif dengan jelasnya berhak diberikan pampasan untuk apa-apa kerugian atau kerosakan termasuk kehilangan pendapatan dan keuntungannya, jika ada, walaupun ia tidak boleh bergantung sepenuhnya pada kl. 11. 2 untuk berbuat demikian. Oleh itu, perkara ini diremitkan ke Mahkamah Tinggi untuk taksiran ganti rugi bagi memastikan plaintif diberi pampasan dengan adil dan munasabah untuk tindakan dan pelanggaran defendan.

Case(s) referred to:

Beihai Zingong Property Development Co and Another v. Ng Choon Meng [1999] 1 SLR (R) 527 ***(refd)***

Bonham Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

CIMB Bank Bhd v. Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 1 LNS 104 HC ***(refd)***

Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 SC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2014] 1 LNS 1075 CA ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1914-15] All ER Rep 739 ***(refd)***
Hely-Hutchinson v. Brayhead Ltd and Anor [1968] 1 QB 549 ***(refd)***
James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 798 ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(foll)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Kang Hai Holdings Sdn Bhd & Anor v. Lee Lai Ban [2018] 2 CLJ 550 FC ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
Lori (M) Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(foll)***
Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd [2004] 4 CLJ 18 CA ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***
Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 CLJ 236 CA ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Royal British Bank v. Turquand [1843-60] All ER Rep 435 ***(foll)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(foll)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(foll)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***
The Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(foll)***
The Royal British Bank v. Turquand (1856) 119 ER 474 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Victory Avenue MFG (M) Sdn Bhd v. Matsushita Electronic Devices (M) Sdn Bhd [2009] 1 LNS 296 HC ***(refd)***
Yango Pastoral Co Pty Ltd & Ors v. First Chicago Australia Ltd & Ors [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 74, 75
Evidence Act 1950, s. 114(g)
Financial Services Act 2013, ss. 2(1), 8(1)(b), 11, 270, Schedule 1 para 1(a), (b)
Rules of Court 2012, O. 18 r. 13(4)

Banking Act 1959 [Aus], s. 8

For the appellant - Mubashir Mansor; Raja Nadhil Aqran Raja Ahmad Aminollah, U Shasiraj & Lim Hui Li; M/s Raj, Ong & Yudistra
For the respondent - Wong Yee Chue & Tan Swee Poh; M/s YC Wong

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suits No: 22NCVC-382-07-2015 & 22NCVC-618-11-2015 (affirmed).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

B

[1] There are three appeals before us. The first appeal is filed by the appellant/defendant in respect of the judgment entered by the High Court for the plaintiff in the amount of RM612,000; the second appeal by the appellant/defendant relates to the finding of the High Court on liability with damages to be assessed and the third appeal is filed by the appellant/plaintiff against part of the order of the High Court in dismissing part of the plaintiff's claim.

C

[2] For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

Background

D

[3] The defendant, Tabung Ekonomi Kumpulan Usaha Niaga (TEKUN) Nasional, is an agency under the Ministry of Agriculture & Agro-based Industry ("the Ministry"). It approves and disburses loan and collects repayment of these loans. At the material time, the defendant had approximately 300,000 borrowers.

E

[4] The collection of monies from borrowers had been done manually. The defendant's officers physically collect loan repayments from borrowers and physically issue receipts. This process was prone to abuse. The monies collected by the defendant's officers may not be recorded in time or at all and the defendant's record of repayment through the computer system may not be updated.

F

[5] To overcome the abuse, the plaintiff proposed to the defendant that collection of repayment be done *via* a device called the mobile gadget and a system of auto debit of borrowers' bank account, called the standing instruction system. The plaintiff's proposals were made through two letters dated 3 July 2014 and 12 August 2014 respectively.

G

[6] The mobile gadget is a handheld device which is linked to the defendant's computer system. The defendant's officers responsible for the collection would take the mobile gadget along during collection of monies. The borrower has the option of paying by cash, cheque, credit card or debit card. Any payment information which is keyed in or obtained by swiping the payment card through the mobile gadget will be updated real time in the defendant's computer system. The mobile gadget will electronically issue a receipt and a short message service will be sent to the borrower to confirm the transaction. This would reduce the chances of misappropriation of the monies collected and the risk of undetected misappropriation.

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I

[7] As for the standing instruction system, the defendant's borrowers would sign up with the bank and their accounts would be automatically debited and credited into the defendant's account.

Proceedings In The High Court

[8] The plaintiff filed two suits against the defendant (Suits No. 382 and 618), claiming different reliefs arising out of the mobile gadget and the standing instruction, respectively. For Suit No. 382, the plaintiff's claim is for RM29,829,132.40 and other reliefs including a claim for indemnity for damages payable to sub-contractor, general damages for breach of contract and aggravated damages. In Suit No. 618, the plaintiff is claiming for RM612,000 for successfully installing and commissioning the standing instruction system. Both suits were consolidated.

The Plaintiff's Case

[9] It is the plaintiff's case that by a letter of appointment dated 29 August 2014, the defendant appointed the plaintiff to develop the entire core system infrastructure of the defendant which consisted of upgrading the loan repayment facility by introducing the mobile gadget and standing instruction system. Thereafter, by an agreement dated 18 September 2014 ("the agreement"), the defendant awarded the plaintiff the contract to develop and implement the mobile gadget system. By cl. 8.1, the duration of the agreement was fixed for a period of 15 years.

[10] The plaintiff's obligation under the agreement was to draft, design, develop and supply all hardware, software and technology so as to enable the defendant's officers to use the mobile gadget to collect repayment of loans from the defendant's borrowers. It was also the plaintiff's obligation to supply at least 500 mobile gadgets for the defendant's use throughout Malaysia. Under the agreement, the plaintiff was also required to supply all relevant technical services.

[11] The mobile gadget project was based on a zero investment concept where all costs and expenses were to be borne by the plaintiff. In consideration thereof and pursuant to cls. 5.1 and 5.2 of the agreement, the plaintiff was entitled to RM1.50 for every loan repayment transaction ("the plaintiff's fees"). From the said RM1.50, the defendant was entitled to RM0.20.

[12] Under cl. 6.3 of the agreement, the total of the plaintiff's fees for each month shall not be less than 130,000 transactions ("minimum monthly transaction"). If there were less than 130,000 transactions, the defendant would have to pay the difference between the actual total fees of the plaintiff and the minimum monthly transaction for each month. This differential payment was to be paid by the defendant within seven business days of the following month.

[13] The plaintiff entered into a sub-contract agreement with Six Sigma Solutions Sdn Bhd ("Six Sigma") on 30 September 2014. This sub-contract is a back to back arrangement where the entire job to be undertaken by the plaintiff under the agreement with the defendant will be performed by Six

Sigma. Under the sub-contract agreement between the plaintiff and Six Sigma, Six Sigma would earn RM1 per transaction, which means the plaintiff would only realise a profit of RM0.30 per transaction.

[14] On 26 November 2014, the plaintiff delivered 28 mobile gadgets to the defendant's headquarters in the Federal Territory. Since then, the mobile gadget system was successfully in use. The remaining 472 mobile gadgets were ready to be delivered to all of the defendant's branches throughout the country.

[15] The defendant however refused and failed to give any instructions or consent to the plaintiff to deliver the remaining 472 mobile gadgets. On 20 March 2015, the defendant directed all its officers in the Federal Territory to stop using the mobile gadgets. The defendant also failed to pay the plaintiff's invoices and refused to continue with the mobile gadget project without providing any reasons. The plaintiff's access to the defendant's database and system was blocked. The plaintiff's application was blocked on 23 March 2015.

[16] The plaintiff contended that the defendant breached the terms and repudiated the agreement. After giving the requisite contractual notices under the agreement for the defendant to rectify the breaches and the defendant having failed to do so, the plaintiff proceeded to terminate the agreement and claimed damages for the breaches and for wrongful repudiation of the agreement by the defendant.

[17] In respect of the standing instruction system, the plaintiff gave the defendant a quotation dated 26 September 2014 to develop and to complete the project at a cost of RM612,000. The plaintiff contended that the quotation was accepted and agreed to by the defendant, whereupon the plaintiff developed and completed the project. The system was tested with Malayan Banking Berhad ("Maybank") and after being accepted and approved by the defendant, the project went "live" on or about 24 December 2014. The plaintiff sent an invoice dated 19 January 2015 for the quoted amount of RM612,000. The defendant failed to make payment.

The Defendant's Case

[18] The defendant, *vide* an e-mail dated 29 December 2014, informed the plaintiff that they were unable to take delivery of the mobile gadgets until a study/review is completed.

[19] By a letter dated 20 March 2015, the defendant intimated to the plaintiff that they were suspending the use of the mobile gadget as per the instructions of the defendant's board of trustees and that the use of mobile gadgets would be put on hold pending further review.

[20] Pursuant to the directions of the defendant's board of trustees, the plaintiff was invited to attend a meeting on 17 April 2015. In this meeting, the defendant informed the plaintiff that they would renegotiate the terms of the agreement with the plaintiff. The defendant reiterated this position in their letter to the plaintiff dated 20 April 2015.

[21] On 29 April 2015, the defendant issued a letter requesting the Ministry to intervene in the matter. The Ministry's representative set a date for a meeting on 22 May 2015. At the request of the plaintiff, this date was postponed to 26 May 2015. On 26 May 2015, the plaintiff's representative or its solicitors failed to attend. The defendant alleged that thereafter, in breach of cl. 18.1 of the agreement regarding mutual trust and good faith, the plaintiff made no further attempt to set another date for discussion/negotiations.

[22] By a letter dated 26 May 2015 from the Ministry, the defendant was directed to terminate the agreement *inter alia*, due to breach of procedures in the procurement process. The case was also being investigated by the Malaysian Anti-Corruption Commission. The defendant alleged that Datuk Abdul Rahim bin Hassan, the then MD/CEO of the defendant had no authority to enter into the agreement and that his authority was limited to RM500,000. Any transaction in excess of RM500,000 must obtain the approval of the board of trustees.

[23] Insofar as the standing instruction system is concerned, the defendant admitted that the system was developed and completed by the plaintiff, accepted by the defendant and that the system went live on or about 24 December 2014. The defendant also admitted that the plaintiff sent an invoice for RM612,000 for the standing instruction system duly developed and completed by the plaintiff. However, the defendant contended that it was not liable to pay as there was no agreement for the said amount and as the standing instruction system was part of the zero investment scheme.

Findings Of The High Court

[24] His Lordship found that the plaintiff had successfully developed the system for the mobile gadget project; that the user acceptance test for the project was successfully conducted; that the defendant had approved and accepted the system for the mobile gadget project and that the plaintiff had conducted training sessions for the defendant's officers.

[25] His Lordship considered the authority of the MD/CEO who executed the agreement for the defendant and the argument that the agreement was invalid because there was no approval by the defendant's board of trustees. The learned judge found no credible evidence that there was in existence such an internal process or procedure which requires contracts with a monetary value in excess of RM500,000 to be approved by the defendant's board of trustees.

[26] Relying on *Hely-Hutchinson v. Brayhead Ltd and Anor* [1968] 1 QB 549 and *The Royal British Bank v. Turquand* (1856) 119 ER 474, the learned judge held that even if there was a requirement for approval by the board of trustees (which has not been credibly proven), the absence of such an approval does not affect the validity or enforceability of the agreement. The learned judge further found that pursuant to cl. 3.4(a) of the agreement, it was the defendant's responsibility to ensure that all the internal approvals, whatever they may be, are properly in place so as to ensure that the agreement is effective.

[27] Taking into account the events that transpired after the execution of the agreement, the learned judge held that there was strong credible evidence of acquiescence by the defendant that there was a valid contract for the mobile gadget project.

[28] On the issue of breach of agreement, the learned judge held that the defendant's conduct in unilaterally suspending the mobile gadget project was a conduct which evinced an intention to be no longer bound by the terms of the agreement and was therefore repudiatory of the agreement. The plaintiff was therefore entitled to put an end to the agreement by issuing notice of termination under cls. 10.1 and 10.2 of the agreement.

[29] The learned judge also considered cl. 11.4 which provides for termination of the agreement pursuant to a change of the Government of Malaysia or pursuant to any instructions to that effect by the Government of Malaysia and for the parties to mutually discuss the winding down of the project. His Lordship also considered cl. 18.1 of the agreement which provides:

> 18. MUTUAL TRUSTS
>
> 18.1 The Parties hereby acknowledged for a fact that is impracticable to make provision for every contingency that may arise, the Parties hereto declare it to be their intention that this Agreement shall operate between them with fairness and without detriment to any of them. If by reason of any unforeseen occurrence or development the operation of this Agreement it is likely to cause any inequitable hardship to one or more parties contrary to the spirit of the Agreement, the Parties shall negotiable *(sic)* immediately in good faith and use their best endeavours to agree upon such action as may be necessary or equitable.

[30] His Lordship formed the view that cl. 18 of the agreement is not meant as an easy escape route for the defendant to compel the plaintiff to the discussion table in order to re-negotiate the terms of the agreement. In order for cl. 18 to be invoked, it must be shown by credible evidence that an unforeseen event/occurrence or development has arisen and that the operation of the agreement is likely to cause inequitable hardship on one of the parties. In the present case, the learned judge found no evidence that such unforeseen events or developments have taken place.

[31] The conduct of the defendant, according to the learned judge, merely demonstrates that they had a change of mind in respect of the commercial terms and the duration of the agreement. The fact that there may be some non-compliance with the defendant's internal process or procedures (which at any rate the learned judge found not proven) is not a reason which falls within the purview of cl. 18 of the agreement.

[32] In respect of the plaintiff's claim for RM29,829,132.40, the learned judge ruled that it is an item of special damages which must be specifically pleaded and strictly proven.

[33] The learned judge considered the authorities on damages, *inter alia* *Bonham Carter v. Hyde Park Hotel* [1948] WN 89; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360; *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; [2015] 2 MLJ 24) and the objection taken by the defendant that the claim was caught by s. 75 of the Contracts Act 1950 ("the Contracts Act"). His Lordship found that the defendant had not challenged the factual and legal basis of the plaintiff's claim. His Lordship held that the plaintiff was however not entitled to claim the specific contract sum in light of s. 75 of the Contracts Act but nevertheless made an order, in the exercise of his residual discretion, that the plaintiff was entitled to general damages which was to be assessed.

[34] The learned judge dismissed the plaintiff's claim for indemnity in respect of the so-called liability towards Six Sigma and also dismissed the plaintiff's claim for aggravated damages.

[35] For the standing instruction system where the plaintiff claimed for RM612,000, the learned judge concluded that the letter of appointment covered both the standing instruction system and mobile gadget project and that in all probability, there was an assumption and expectation on the part of the defendant that the standing instruction system would also be covered by the zero investment concept. Based on the events that took place, His Lordship however found that the assumption or expectation had been demolished upon the issuance of the plaintiff's quotation of RM612,000 and the issuance of the invoice after the standing instruction system had been fully commissioned.

[36] His Lordship further found that the plaintiff had fulfilled the obligation as the system went "live". Regardless of whether the defendant thought that the standing instruction system was within the scope of the letter of appointment or within the zero investment concept or whether it needed the board of trustees' approval, the learned judge opined that the equation changed once the quotation was given to the defendant, followed by the execution of the standing instruction system by the plaintiff and the subsequent issuance of the invoice.

[37] By reason of all the circumstances and conduct of the parties, the learned judge held that the defendant is estopped from reneging on their obligation to pay under the invoice dated 19 January 2015. Judgment was therefore entered against the defendant for the sum of RM612,000 with interest and costs.

[38] Aggrieved, both the plaintiff and the defendant filed notices of appeal to this court, as stated in para. [1] above.

The Appeal

[39] The common issues for these appeals relate to:

(i) Illegality;

(ii) Liability; and

(iii) Damages and quantum.

The Defendant's Submission/Appeal

[40] On illegality which was raised for the first time before us, learned counsel for the defendant submitted that the agreement was void and unenforceable for being in contravention of the relevant provisions of the Financial Services Act 2013 ("FSA").

[41] Essentially, learned counsel submitted that the nature of the plaintiff's obligations under the agreement was such that the plaintiff has contracted to operate a "payment system" within Schedule 1, Part 1, Division 1 of the FSA. For the agreement to be legal, the plaintiff ought to have been "an approved operator of payment system" within s. 2(1) of the FSA. The plaintiff did not have any approval from Bank Negara and this contravenes s. 8(1)(b) of the FSA.

[42] Several authorities were cited to support the defendant's argument, including the Supreme Court decision in *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143; [1994] 1 MLJ 369.

[43] On liability, the defendant submitted that the evidence of Omar bin Othman, the Timbalan Ketua Pegawai Eksekutif (Kewangan), ("DW1") that the then MD/CEO had no authority to enter into the agreement for the defendant, stood unchallenged. The burden to prove the MD/CEO's authority to sign the contract on behalf of the defendant now falls on the plaintiff which the plaintiff has failed to discharge. In support of his submission, learned counsel for the defendant cited *inter alia Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627; *CIMB Bank Bhd v. Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 1 LNS 104; [2010] 8 MLJ 607 and *Victory Avenue MFG (M) Sdn Bhd v. Matsushita Electronics Devices (M) Sdn Bhd* [2009] 1 LNS 296; [2009] 5 MLJ 243. The plaintiff's failure to do so justifies the invocation of adverse inference under s. 114(g) of the Evidence Act 1950. In this regard, the defendant submitted that the learned judge erred in fact and in law in finding that there was no credible evidence on the issue of authority of the MD/CEO.

[44] It was further submitted for the defendant that the plaintiff had been put on notice of MD/CEO's lack of authority. Any reasonable man in PW1's position would have made reasonable follow-up enquiries on the status of any decision of the board. PW1 could have asked for a board's resolution with an express approval of the contract. To advance his case, learned counsel cited *inter alia Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 and *Kang Hai Holdings Sdn Bhd & Anor v. Lee Lai Ban* [2018] 2 CLJ 550; [2018] 1 AMR 252.

[45] It was also argued for the defendant that the learned judge erred in fact and in law in not holding that as a result of the contract being entered into by the MD/CEO purportedly for the defendant without authority, the end result was that there was no contract in existence between the plaintiff and the defendant and in addition, there was no evidence that the board of trustees had ever ratified the unauthorised contract.

[46] Alternatively, it was argued that there was no breach of contract by the defendant and that the learned judge erred in fact and in law in holding that there was a repudiatory breach of the contract by the defendant.

[47] Learned counsel highlighted that there was no absolute refusal by the defendant to perform the contract. The defendant had asked for the contract to be re-negotiated. All the defendant wanted was to sit and discuss. The defendant contended that it was the plaintiff who was in breach by unlawfully terminating the contract.

[48] As regards quantum, the defendant submitted that the learned judge erred in holding that the legal and factual basis of the plaintiff's claim for RM29,829,132.40 was not challenged. Learned counsel argued that the defendant had always disputed the alleged liability and damages. Indeed, by O. 18 r. 13(4) of the Rules of Court 2012, any allegation of damages and amount of damages in a party's pleading was deemed to be traversed unless specifically admitted. Therefore, it was incumbent upon the plaintiff to prove each and every material part of its case against the defendant.

[49] The defendant further submitted that the learned judge erred in law in giving the plaintiff a second chance to prove the alleged damages by making an order for damages to be assessed. This was because the trial was on both liability and damages. The plaintiff had every opportunity to prove its case for damages and having failed to do so, it was trite law that at best, the plaintiff could only be awarded nominal damages.

[50] The defendant had also argued that the plaintiff has not proved its alleged losses in accordance with the usual law of remoteness of damages as prescribed under s. 74 of the Contracts Act.

[51] On the standing instruction system, the defendant submitted that the learned judge seriously misdirected himself in construing the contract based on subsequent events (see *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 798; *Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 CLJ 236; [2000] 2 MLJ 456). It was further submitted that the decision of the learned judge was contrary to evidence. Learned counsel for the defendant highlighted the evidence of Roshaimi bin Harun, the Ketua Jabatan Latihan Keusahawan ("DW2") who testified that his signature on the quotation was "bertujuan sebagai penerimaan sebut harga hanya untuk simpanan dan rujukan saya".

[52] It was also submitted for the defendant that the learned judge fell into serious error of law in allowing the plaintiff's claim for expenses of RM612,00 when His Lordship had accepted that the standing instruction system was part of the same zero investment.

The Plaintiff's Submission/Appeal

[53] In the course of submission, the plaintiff abandoned its appeal against the dismissal of its claim for indemnity and aggravated damages.

[54] As regards the claim for RM29,829,132.40 it was computed based on cl. 11.2 read with cl. 11.1 of the agreement which provide:

> 11.1 Upon termination of this Agreement:
>
> (a) The defaulting Party shall within thirty (30) days arrange for the payment for the loss of profit and other cost associated to the termination in accordance with Clause 11.2 therein; and
>
> (b) The Parties' obligations under this Agreement shall cease and, where such termination is due to the default, breach, act, omission of or otherwise attributable to either Party, the defaulting Party shall indemnity for all costs and expenses incurred by another Party in connection with the Project.
>
> 11.2 In the event that this Agreement is unilaterally terminated by either Party during the subsistence of this Agreement, the defaulting Party shall pay compensation to the other Party reflecting to that Party's Opportunity loss of income for the unexpired term of this Agreement. A Party's Opportunity loss shall be defined as the Party's Entitlement in accordance with clause 5.1 therein earned in the preceding twelve (12) months prior to the termination, multiplied by the unexpired term, measured in years of this Agreement.

[55] The plaintiff takes the minimum 130,000 transactions per month for 15 years multiplied by RM1.30 plus the unpaid invoices in the sum of RM681,002.40 minus the security deposit of RM50,000 already paid by the defendant. The learned judge disallowed the plaintiff's claim for RM29,829,132.40 on the ground that the claim computed pursuant to cl. 11.2 is prohibited by s. 75 of the Contracts Act. In this regard, it was submitted for the plaintiff that the learned judge erred, *inter alia,* in allowing the defendant to rely on s. 75. This defence was never pleaded and was never raised at the trial.

[56] The learned judge also erred in failing to exercise the judicial mind to construe cl. 11.2 accordingly before concluding that it is a penalty and prohibited by s. 75 of the Contracts Act. *Beihai Zingong Property Development Co and Another v. Ng Choon Meng* [1999] 1 SLR (R) 527; *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2007] 4 CLJ 725; [2007] 5 MLJ 501 and *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd* [1914-15] All ER Rep 739 were cited in support of the submission. It was further submitted for the plaintiff that had the learned judge taken into consideration all relevant factors, he ought to have found that by cl. 11.2 the intention of

the parties was to assess damages and not to secure performance of the agreement. In other words, cl. 11.2 is a genuine pre-estimation or assessment of damages and s. 75 of the Contracts Act is not applicable.

[57] Alternatively, it was submitted for the plaintiff that based on the totality of the evidence, the plaintiff has proved the amount of its damages. The evidence which was not challenged was that due to the defendant's repudiatory breach, the plaintiff suffered loss of income for the unexpired term of the agreement.

[58] The plaintiff's net income per transaction would be RM1.30-RM1 (RM1 was to be paid to Six Sigma) = RM0.30 per transaction. The defendant has guaranteed a minimum income to the plaintiff based on at least 130,000 transactions. The plaintiff's minimum net income would have been RM0.30 x 130,000 = RM39,000.

[59] The agreement was for a period of 15 years from 18 September 2014 to 17 September 2029. When the agreement was terminated on 26 April 2015, the unexpired term of the agreement from 26 April 2015 to 17 September 2029 would be 172.77 months. Thus the plaintiff's minimum net income for the unexpired term would be RM39,000 x 172.77 months = RM6,738,030.

[60] The amount of RM6,738,030, according to the plaintiff, is the net income which the plaintiff would have earned but for the defendant's breach. This amount represents the plaintiff's loss of income resulting from such breach. In addition to the loss of income above, as at 26 April 2015, there was an outstanding fee of RM681,002.40 invoiced by the plaintiff and not paid by the defendant. Therefore the total loss suffered by the plaintiff by reason of the defendant's breach is RM6,738,030 + RM681,002.40 = RM7,419,032.40.

Our Findings

Whether The Agreement Is Void For Illegality

[61] It was argued for the defendant that the agreement was not a mere contract of supply but *ex facie* it was a contract for "payment system". Learned counsel cited Part 1 Division 1 of Schedule 1 of the FSA which states:

PART 1

Approved business

Division 1

Businesses which require approval

1. Operation of a payment system which:

(a) enables the transfer of funds from one banking account to another, which includes any debit transfer, credit transfer or standing instructions but does not include the operation of a remittance system approved under section 40 of the Money Services Business Act 2011; or

(b) provides payment instrument network operation which enables payment to be made through the use of a payment instrument.

[62] The defendant submitted that the standing instruction system fell within the terms of para. 1(a) and (b) of Division 1 Part 1 whereas mobile gadget was covered by para. 1(b). Reference was then made to s. 2(1) of the FSA which defines "payment system" as any system or arrangement for the transfer, clearing or settlement of funds or securities" and to s. 8(1)(b) of the FSA which provides: "No person shall carry on any authorised business unless it is approved by the bank under s. 11 to carry on any of the businesses set out in Division 1 of Part 1 of Schedule 1." "Authorised business" as defined in s. 2(1) of the FSA means a licensed business or an approved business.

[63] It is not in dispute that the plaintiff had no licence to carry on the authorised business of payment system. However, we do not think that the agreement is *ex facie* illegal. Under the agreement, the plaintiff has undertaken to build and to develop the mobile gadget and standing instruction system for the defendant for purposes of collection of loan repayment from the defendant's customers. It is the defendant who collects the repayment either through the mobile gadget device used by the defendant's officers or through the standing instruction system operated by Maybank. The plaintiff merely provides the infrastructure. In other words, the plaintiff supplied the system and the defendant used or applied the system for its business of collection repayment of the loan.

[64] Further, the agreement envisages the involvement of Bank Negara as evident from cl. 6.1 and envisages the appointment of a third party sub-contractor under cls. 3.3 and 4.1. On the evidence, there was a sub-contract between the plaintiff and Six Sigma. Six Sigma in turn liaised with a company called GHL. GHL had the necessary licence from Bank Negara to operate the payment system.

[65] Be that as it may, on the issue of illegality, we find guidance from the Federal Court decisions in *The Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313 and *Lori (M) Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81. In *Lori (M) Bhd*, Edgar Joseph Jr FCJ said at p. 1016 (CLJ); p. 104 (MLJ):

> It is well settled that at Common Law, a contract or transaction in breach of a statutory prohibition and an associated contract is, in general, void for illegality even though the statute is silent as to its consequences and merely inflicts a penalty on the wrongdoers (see *Menaka v. Lum Kum Chum (ibid)*, at pg 94, *Phoenix General Insurance Co of Greece SA v. Administratia Asigurarilor de Stat (ibid)* but this is subject only to any contrary intention manifested by the statute (see *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd (ibid)*).

[66] In *Yango Pastoral Co Pty Ltd & Ors v. First Chicago Australia Ltd & Ors* [1978] 139 CLR 410, the respondent granted a loan to the first appellant, repayment of which was secured by mortgage which incorporated a guarantee given by the other appellants. The first appellant defaulted in repayment. The respondent sued the appellants on the personal covenants in

the mortgage. The appellants pleaded illegality. Their case was that the mortgage (including the guarantee) was rendered illegal and void by the provisions of s. 8 of the Banking Act 1959, as amended or alternatively that by reason of the provisions of s. 8 a court would not assist the respondent to give effect to the transaction.

[67] In holding that judgment was rightly given to the respondent, Gibbs ACJ said at pp. 413-414:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy, it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. … Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.
>
> The question whether a statute, on its proper construction intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes. …
>
> There is no doubt that Pt. II of the Banking Act, in which s. 8 appears, was enacted partly at least for the protection of depositors, or that one object of s. 8 is the protection of the public. Section 8 of course does not expressly prohibit the making or performance of contracts, but the argument advanced on behalf of the appellants was that the prohibition which it imposes on an unauthorised body corporate from carrying on any banking business extends to all activities which go to make up the business of banking …
>
> The language of s. 8 indicates that it is directed, not at the making or performance of particular contracts, but at the carrying on of any banking business.
>
> …
>
> Having regard to the language of s. 8 and to the matters to which I have referred, I conclude that s. 8, on its proper construction does not vitiate contracts made by a body corporate in the course of carrying on a banking business in breach of the section.

[68] Likewise in the instant case, s. 8 of the FSA did not provide that a contract which purports to render services to an approved business without first securing the approval from Bank Negara is void and unenforceable.

Further, there is a provision in s. 270 of the FSA which 'manifested the contrary intention of the statute' as held in *Lori (M) Bhd*. Section 270 reads:

270. Breach or contravention not to affect contract, agreement or arrangement.

Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement, or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:

Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[69] Pursuant to s. 270 which is a saving provision, the mere fact that the agreement was entered in contravention of the FSA, is not by itself sufficient to render the agreement void. There must be some other provisions in the FSA which has the effect of rendering the agreement void. Except for various provisions on penalty and sanction for breach, we do not find any other invalidating provisions in the FSA which has that effect.

[70] In the instant case, collecting repayment from its customers had been the business of the defendant for a long time *albeit* done manually without the mobile gadget and standing instruction system developed by the plaintiff. The defendant had the requisite approval from Bank Negara to do so. As such, it was at all material times carrying on approved or licensed business. Such approval was for the giving out of loans and collection of the same. The present contract merely serves to facilitate the collection of the repayment of loans using information technology to replace manual collection. Surely the business of collection of the repayment of its loans cannot be an illegal business. If at all there is any element of illegality by the implementation of the new improved system of collecting repayment, the defendant, a Government agency cannot rely on its own illegality to defeat the agreement. We are thus unable to sustain the defendant's argument on illegality and we hold that the agreement is valid.

Whether Liability Has Been Established Against The Defendant

[71] It was the plaintiff's case that the following acts of the defendant constituted a breach of the agreement:

(i) The defendant refused to accept delivery of the remaining mobile gadgets or received training for its officers in other States by the plaintiff despite the plaintiff's repeated requests and reminders;

(ii) The defendant directed all its officers in the Federal Territory to completely stop using the mobile gadgets for the collection of repayment of loan on 20 March 2015 without giving prior notice to the plaintiff;

(iii) The defendant had only paid two monthly instalments of RM25,000 each out of the 20 monthly instalments for the deposit fee for the mobile gadget as required under cl. 3.6(f) of the agreement ie, in the months of September and October 2014 and failed to pay the

subsequent monthly instalments since the month of November 2014. The plaintiff's invoices for the instalments of deposit for the months of November 2014 to March 2015 respectively, remained unpaid.

(iv) The defendant did not make any payment towards the invoices for cash and cheque transactions issued by the plaintiff in accordance with cl. 6.2(c) of the agreement for the months of November 2014 till February 2015;

(v) The defendant did not make any payment towards the invoices issued by the plaintiff based on the minimum guarantee of monthly transactions in accordance with cl. 6.3 of the agreement for the months of January, February and March 2015;

(vi) The defendant did not at all inform or discuss with the plaintiff about the defendant's refusal to continue with the project and the reasons behind such refusal;

(vii) The defendant took drastic step to block the plaintiff's access to the defendant's database and system; and

(viii) The defendant blocked the plaintiff's application abruptly on 23 March 2015 without giving any prior notice to the plaintiff.

[72] The learned judge found that the conduct of the defendant in unilaterally suspending the mobile gadget project allegedly because they wanted to conduct a review as to its feasibility and/or to obtain the board of trustees' approval are nothing but a façade or cloak to re-negotiate the monetary terms of the agreement. His Lordship further found that all of the actions of the defendant as described by the plaintiff cumulatively tantamount to conduct which is repudiatory of the agreement and the conduct of the defendant before the issuance of the plaintiff's notice of termination was akin to an "absolute refusal by the defendant to perform their part of the agreement."

[73] We find no appealable error of law or fact in the findings of the learned judge which was based on evidence. We agree that the defendant's unilateral act of suspending the mobile gadget project amounts to a breach of the agreement. We would add that whilst the defendant placed much reliance on cl. 18.1 of the agreement on mutual trust to contend that it was the plaintiff who had breached the agreement by their alleged refusal to attend the meetings and to re-negotiate, it must be emphasised that the defendant had completely ignored this particular clause before unilaterally acting as they did as stated in para. [71] above.

[74] We further agree with the learned judge that cl. 18.1 can only be invoked if there was unforeseen occurrence or development and that the defendant's change of mind and the purported non-compliance with the defendant's internal procedure does not entitle the defendant to resort to cl. 18.1. The termination by the defendant pursuant to the direction given by the Government, in our view, was ineffective as prior thereto, the agreement had already been terminated by the plaintiff.

[75] On the issue of authority or lack thereof of the MD/CEO, we similarly find no appealable error on the part of the learned judge to warrant our appellate intervention. His Lordship considered the law on the authority of an agent; actual, apparent or ostensible as set out in *Hely-Hutchinson*.

[76] On the facts of this case, we find that *Turquand* rule as decided in *Royal British Bank v. Turquand* [1843-60] All ER Rep 435, applies:

> Persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done; and therefore, the company was liable whether or not a resolution had been passed.

[77] The Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465, states that the rule in *Turquand*'s case protects outsiders dealing with the company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed. These outsiders are not bound to inquire whether acts of internal management have been regular. It was also held by the Federal Court that *Turquand*'s case cannot be invoked if the outsider relying on the rule knows or ought to have known that there is an irregularity in the management of the company.

[78] The defendant contended that the plaintiff ought to have asked for the board of trustees' resolution. In this regard, learned counsel for the defendant relied on *Kang Hai Holdings* where Prasad Abraham Sandosham FCJ said at p. 559 (CLJ); p. 258 (MLJ):

> [14] … With the rapid development of modern technology, and the access to information available in the database of the Companies Commission of Malaysia, the law in our view imposes a minimum duty on the "outsider" to, at the very least, make this minimum check to afford the outsider the protection of the rule in *Turquand.* …
>
> [15] … More particularly, outsiders dealing with a company who knows that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v. Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception … .

[79] *Kang Hai Holdings* concerns a director of a company who had ceased to be a director. The Federal Court considered the effect of the particulars of Form 49 on an outsider where it was held at pp. 562-563 (CLJ); p. 261 (MLJ):

> … Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time.

[80] To our minds, the latest Federal Court decision in *Kang Hai Holdings* does not change or modify the decision in *Pekan Nenas.* Furthermore, in the instant case, the plaintiff was not dealing with a company but with a Government agency. There was no evidence that the plaintiff knew of any irregularity in the internal management of the defendant. On the contrary, there was evidence that the plaintiff had no knowledge of the defendant's purported policy that any transaction above the value of RM500,000 requires the approval of the board of trustees. In fact, during trial, in cross-examining Faiyaz Ali bin Thaiyoobu Thahir ("PW1"), the defendant took the position that whether or not the defendant needed to take the agreement to the board of trustees was an internal matter or procedure and that the plaintiff had no knowledge of the internal procedure of the defendant. There was also evidence that the plaintiff was informed by the MD/CEO during the meetings that the matter was brought to the defendant's board of trustees for approval.

[81] In addition, we find that by cl. 7.1 of the agreement, the defendant had given a clear representation to the plaintiff of the *Turquand* rule. Clause 7.1 reads:

> 7.1 TEKUN hereby represents and warrants to PDSB that TEKUN is entitled to and has the unconditional right to appoint PDSB for the performance of the Project and undertakes to indemnify and keep indemnified PDSB for any loss or damage directly suffered or incurred by PDSB if for any reason PDSB is not permitted to undertake or continue undertaking the Project.

[82] We therefore find no basis to conclude that the judge was plainly wrong on the issue of authority of the MD/CEO and we are in total agreement with the learned judge on his findings below:

> 100. Here, the agreement was executed by the MD/CEO and duly witnessed by DW1, who was the Deputy CEO in charge of Finance. DW1, more than anyone else should have known about the need for board of trustees approval, if indeed there was such a need internally. In this regard, it is significant that DW1, together with senior officials of the defendant (including the Head of Internal Audit and Head of Legal) attended the last meeting on 17 September 2014 and nothing was raised about the need for board of trustees approval at that meeting.
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> 104. … In the present case, the person who executed the agreement on behalf of the defendant was the then MD/CEO. In law, an MD/CEO, is someone who has either actual or ostensible authority to bind the company. …
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> 105. Also, it is significant that the agreement was not transacted or discussed surreptitiously between the plaintiff's representatives and the then MD/CEO. Rather, it was discussed transparently at various meetings and went through various drafts before it was finalised and executed. At these meetings several high ranking officials from the defendant, including the defendant's legal officer, were present.

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[83] We also agree with the learned judge on his findings with regards the standing instruction system. His Lordship had considered the contemporaneous documents and the whole circumstances and probabilities of the case (*Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229). The findings are not perverse. We endorse the findings of the learned judge that

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the plaintiff had fulfilled their obligation. The development of the standing instruction system was completed. A user acceptance test was held on 3 November 2014 and a series of tests were successfully conducted. The system was accepted by the defendant. It was uploaded onto the defendant's server and the system went 'live' on 24 December 2014.

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[84] We therefore affirm the learned judge's finding on liability for both mobile gadget project and the standing instruction system.

Whether The Plaintiff Is Entitled To The Sums Claimed For Mobile Gadget Project And The Standing Instruction System

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[85] The plaintiff made separate claims for mobile gadget project and the standing instruction system. In this regard, we uphold the learned judge's finding that because the mobile gadget project represented "phase one" of the system, the letter of appointment covered both the standing instruction system and the mobile gadget project. However, after the letter of

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appointment was issued, there were discussions between the parties which culminated in the finalisation of the terms of the agreement. As observed by the learned judge, the agreement significantly made no mention of the standing instruction system. In fact, the agreement deals solely with the mobile gadget project.

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[86] We further agree with the learned judge that although the defendant may have initially expected the standing instruction system to be part of the zero investment concept, based on the conduct of the defendant, that expectation had been demolished. It was indeed strange that the defendant did not object to the plaintiff's detailed quotation on the standing instruction

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system. Not only did the defendant fail to object to the quotation for RM612,000, the invoice that followed was duly acknowledged by the defendant. The conduct of DW2 who testified that the quotation and invoice received and acknowledged was merely to be kept and referred by him was in defiance of logic, common sense and commercial sense.

[87] Indeed, if there was no such understanding that the plaintiff be paid separately for the standing instruction system, one would have expected the defendant to immediately protest and/or raise an enquiry with the plaintiff on the quotation (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155; *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233; *Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 and *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779). Moreover, there was evidence led by PW1 that the invoice was acknowledged after several weeks as DW1 wanted to be certain that the standing instruction system had been successfully implemented and gone live. Clearly, the reasonable inference to be drawn from the established facts would be that the defendant had agreed to the quotation of RM612,000.

[88] For the above reasons, we uphold the learned judge's decision on quantum of RM612,000 for the standing instruction system.

[89] In respect of the mobile gadget project, the learned judge ruled that the sum of RM29,829,132.40 claimed by the plaintiff is an item of special damages which must be specifically pleaded and strictly proven.

[90] Although His Lordship decided that the plaintiff was not entitled to the specific amount claimed under cl. 11 of the agreement in the light of s. 75 of the Contracts Act, he found that the plaintiff was entitled to general damages which was to be assessed.

[91] Notwithstanding that the trial was conducted on the basis of both liability and quantum, the learned judge was of the view that the trial was still afoot and he could exercise his residual discretion to order damages to be assessed, as a matter of procedural fairness and justice, since the defendant had not specifically challenged the specific amount claimed by the plaintiff until the submission stage.

[92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829.132.40 is an item of special damages. In our view, it is general damages quantified as per cl. 11.2 upon breach. Clause 11.2 appears to us to be a penalty under s. 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under s. 75 (see *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569). As cl. 11.2 contravenes s. 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal*. It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829,132.40.

[93] That however was not the end of the matter. Breach of contract may give rise to damages for loss of profit pursuant to s. 74 of the Contracts Act. In our view, a construction of the contract as a whole discloses that cl. 6.3 is part of the clause dealing with consideration or price as agreed between the parties. This is to be differentiated from cl. 11.2 which is a provision for compensation on default or breach, which we found to be a penalty. Therefore in assessing damages, cl. 6.3 is not caught by s. 75 of the Contracts Act.

[94] In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177, trial was conducted on both liability and quantum. The claim for lost profit was dismissed by the High Court which was upheld by this court. In the Federal Court however, it was recognised, as we have done here, that the aggrieved party was entitled to damages for loss of profit on principle pursuant to s. 74 of the Contracts Act which provides:

> **Compensation for loss or damage caused by breach of contract**
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> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.
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> (2) Such compensation is not to be given for any remote and indirect loss for damage sustained by reason of the breach.

[95] The Federal Court went on to hold that it did not approve the mode of calculation for the loss of profit. The matter was then remitted to the High Court for assessment of damages notwithstanding that the trial was not bifurcated. At p. 216, Zainun Ali FCJ said:

> [118] However, we do not approve of the appellant's method of calculation for the loss of profit. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that "this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance [of] 20 months. The accuracy of these figures were not challenged during trial. …
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> [119] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on "commissions", that is to say receipts, is very different from a calculation based on "profits". To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in

> the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.
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> [120] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl. 8.5 was wholly inadequate.
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> …
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> [122] … We order that this claim be remitted to the High Court for assessment of damages, by a High Court Judge on the issue of quantum occasioned by a wrongful termination of the contract.

[96] In like manner in the instant case, the plaintiff is clearly entitled to be compensated for any loss or damage including its loss of earnings and profits, if any, although it cannot rely solely on cl. 11.2 to do so.

Conclusion

[97] In light of all the above, we unanimously dismiss both the defendant's appeal and the plaintiff's appeal. Guided by the decision of the Federal Court in *SPM Membrane*, we therefore conclude that the matter be remitted to the High Court Judge for assessment of damages in order to ensure that the plaintiff is fairly and reasonably compensated for the defendant's conduct and breach.